No. 86912-0

J.M. JOHNSON, J. (dissenting)—Deputy Sheriff Edward J. Bylsma was served a burger contaminated with spittle. Fortunately, Deputy Bylsma discovered the spittle before consuming the burger. For this, the responsible Burger King employee was charged and pleaded guilty to felony assault and was sentenced to 90 days in jail.

Now, Deputy Bylsma claims he was so traumatized by the spittle (which he did not consume) that he suffers from ongoing emotional distress, manifested by vomiting, nausea, food aversion, and sleeplessness. Deputy Bylsma sued Burger King and the restaurant operator, Kaisen Restaurants, to compensate him for this alleged distress. Because Washington law proscribes relief for emotional distress damages in the absence of physical injury when a claimant brings a products liability claim, I dissent.

Analysis

I. Emotional Distress Damages Are Not Available for a Statutory Cause of Action unless the Statute Expressly Provides for Them or the Statute Requires Proof of Intentional Conduct

Enacted in 1981, the Washington product liability act (WPLA) "created a single cause of action for product-related harms" taking the place of most previously existing common law remedies.[1] *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 322, 858 P.2d 1054 (1993); RCW 7.72.010. The WPLA was the product of years of legislative efforts to find a solution to the serious problem of "[s]harply rising premiums for product liability insurance," which were "increas[ing] the cost of consumer and industrial goods. . . ." Laws of 1981, ch. 27, § 1; *see also* Philip A. Talmadge, *Washington's Product Liability Act*, 5 U. Puget Sound L. Rev. 1, 1-6 (1981) (detailing the failed legislative attempts and negotiations that preceded the WPLA's passage). The legislature intended the WPLA to address this problem by, inter alia, reducing uncertainty for underwriters through the "establish[ment] [of] clear guidelines for the assertion of a product liability cause of action . . . ." *Id.* at 6.

[1] Common law claims for "fraud, intentionally caused harm, or a claim or action brought under the consumer protection act" were preserved as independent causes of action. RCW 7.72.010(4); *accord Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 850, 774 P.2d 1199, 779 P.2d 697 (1989).

Among other things, the WPLA holds product manufacturers strictly liable if "the claimant's harm was proximately caused by the fact that [a] product was not reasonably safe in construction . . . ." RCW 7.72.030(2). The WPLA defines "harm" as "any damages recognized by the courts of this state . . . ." RCW 7.72.010(6). Accordingly, we must look to our decisional law to determine whether the WPLA allows recovery predicated solely on emotional distress. The question becomes: Under Washington law, is a consumer entitled to emotional distress damages when a fast-food employee spits in his or her hamburger even though the consumer did not eat the hamburger?

This analysis proves somewhat circular; to determine whether emotional distress damages are available for a statutory cause of action (such as a WPLA claim), our case law instructs us to look to the statute first. *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 765, 953 P.2d 796 (1998) ("Whether emotional distress damages are available following a statutory violation will depend on the language of the particular statute at issue."). If the statute is silent, emotional distress damages are available "only if the violation sounds in intentional tort."[2] *Id.* at 766. "The focus is not on the

particular facts of the case [, which may involve intentional conduct,] but whether the statutory violation requires proof of an intentional tort." *Id.* at 769.

Because the statute in question here, the WPLA, defines "harm" by referencing our case law, we must first review our cases to determine if the statute allows for emotional distress damages in this scenario. Our only case to address the availability of emotional distress damages under the WPLA is *Fisons*, 122 Wn.2d at 299.

In *Fisons*, a physician prescribed for a child patient a medication manufactured by the defendant that caused the child to suffer seizures and permanent brain damage. *Id.* at 307. The physician sought emotional distress damages from the drug company under the WPLA. *Id.* at 309. In the absence of directly applicable case law, we looked to negligent infliction of emotional distress (NIED) cases for guidance.[3] *Id.* at 320. In doing so, we

[2] The majority is accurate when it says that "[w]e have not addressed" the specific scenario of a claimant requesting "emotional distress damages absent physical injury in the context of a strict liability claim." Majority at 5. As is discussed here, however, we have addressed the availability of emotional distress damages for statutory violations.

[3] The *Fisons* court did so because it was operating under the assumption that a WPLA claim may involve negligence. *See Fisons*, 122 Wn.2d at 321 ("In a product liability claim, liability can be predicated on negligence or even on strict liability."); RCW 7.72.030(1) uses the word "negligence" while articulating strict liability principles. In *Ayers v. Johnson & Johnson Baby Products Co.*, we clarified that "'negligence' as used in

observed a trend: "Generally, in cases where emotional distress is not a consequence of physical injury, or caused by intentional conduct, Washington courts have been cautious about extending a right to recovery." *Id.* "If the law were otherwise," we said, "[L]iability would potentially be endless." *Id.* at 320-21. We were concerned with "substantially extending our prior law regarding when a plaintiff could recover emotional distress damages caused by the physical injuries of a third person" and therefore held the plaintiff's "emotional pain and suffering [were] not recoverable under . . . the product liability act." *Id.* at 321-22.

Presumably, the majority disregards the *Fisons* analysis because that case involved the emotional distress of a third party witness to another's injuries, whereas here, Deputy Bylsma claims he was directly injured by the defective product. Yet, even if we assume *Fisons* does not speak to the availability of emotional distress damages under the circumstances of this case, then the WPLA, which references case law, is "silent" as to whether emotional distress damages are available. *See Hiltbruner*, 134 Wn.2d at 766. Accordingly, such damages are available only if the WPLA requires proof of

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RCW 7.72.030(1) does not mean common law negligence . . . [i]t means 'negligence-like.'" 117 Wn.2d 747, 762, 818 P.2d 1337 (1991). "[T]he test for design defects . . . is one of strict liability." *Id.*

intentional conduct to impose liability. *Id.* at 768.

Requiring far less than intent, a WPLA claim brought against a manufacturer is rooted in strict liability. RCW 7.72.030(2); *accord Johnson & Johnson*, 117 Wn.2d at 761-63. Strict liability "does not depend on actual negligence or intent to harm," but is "based on the breach of an absolute duty to make something safe." Black's Law Dictionary 998 (9th ed. 2009). Thus, because the WPLA does not require proof of an intentional tort, emotional distress damages are unavailable. *See Hiltbruner*, 134 Wn.2d at 768.

Moreover, prior to the WPLA's enactment, Washington courts had adopted section 402A of the *Restatement (Second) of Torts* in product liability actions. *See, e.g.*, *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969). Section 402A provides in relevant part: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for *physical harm* thereby caused to the ultimate user or consumer." Restatement (Second) of Torts § 402A (1965) (emphasis added). The WPLA expressly states that "[t]he previous existing applicable law of this state on product liability is modified only to the extent

set forth in this chapter." RCW 7.72.020(1). By defining harm as "any damages recognized by the courts of this state," the common law rules regarding damages were both preserved and allowed to develop. *See* Philip A. Talmadge, *Washington's Product Liability Act*, 5 U. Puget Sound L. Rev. 1, 10 (1981). Thus, even before the enactment of the WLPA, Washington products liability law explicitly extended only to "physical harm." Because the WPLA did not alter the state of the common law as to recognized harms, emotional distress damages remain unavailable under that law.

The majority correctly notes that the legislature intended to allow for the "'continuing development'" of "harm" under the WLPA "'through case law.'" Majority at 5 (quoting Senate Journal, 47th Leg., Reg. Sess., at 630 (Wash. 1981)). If it is the majority's intention to overturn *Hiltbruner* and reject the *Restatement (Second) of Torts*, they must first show how our established rule rejecting emotional distress damages in this context is "'incorrect and harmful'" before they can abandon it. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009) ("In Washington, stare decisis protects reliance interests by requiring a 'clear

showing that an established rule is incorrect and harmful before it is abandoned.'" (internal quotation marks omitted) (quoting *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 930 (2004))). The majority makes no such showing and likely would be unable to do so. Ensuring the financial compensation of people claiming emotional distress because they saw spit on their uneaten hamburgers is not a public policy priority.

II. Analogizing to NIED Cases Does Not Instruct that Emotional Distress Damages Are Available Here because Deputy Bylsma's Claim Does Not Fall within the Limited Class of NIED Actions Recognized by Washington Law

The majority also analogizes to negligence cases. This is not only unnecessary, it is misguided. Products liability claims brought against a manufacturer are based on strict liability, not negligence. RCW 7.72.030(2). It would be imprudent to extend recovery for emotional distress damages—which are notoriously difficult to measure—to the realm of strict liability:

> [T]he fault of a defendant is an indispensable element of duty of care in an action brought for the infliction of emotional distress . . . . [I]n the absence of fault or other culpable conduct a defendant may not be rendered liable for this particular harm. To put it another way, it means that in an action instituted for causing emotional trauma, the liability of a defendant is premised plainly and directly on the presence or absence of defendant's fault. Since the doctrine of strict liability is not founded upon

> fault or culpable conduct, a defendant manufacturer should not be held liable under the doctrine for the special harm of inflicting emotional distress upon a plaintiff.

Pasquale v. Speed Prods. Eng'g, 166 Ill. 2d 337, 350, 654 N.E.2d 1365 (1995) (quoting *Shepard v. Superior Court*, 76 Cal. App. 3d 16, 26, 142 Cal. Rptr. 612 (1977) (Kane, J., dissenting)). We must bear in mind that "strict liability is not absolute liability." *Baughn v. Honda Motor Co.*, 107 Wn.2d 139, 127, 727 P.2d 655 (1986). Unfortunately, it is the public that will bear the burden of the increased costs likely to emanate from this unprecedented expansion of products liability. The majority conveniently overlooks the statutory language and legislative history demonstrating that this was the very problem the legislature sought to remedy by enacting the WPLA.

Even assuming a claim for emotional distress under the WPLA may be analogized to a NIED claim, we have placed significant limitations on NIED claims that the majority also completely ignores. *See Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 49, 176 P.3d 497 (2008) ("The tort of [NIED] is a limited, judicially created cause of action . . . ."). Over time we have slowly narrowed what is deemed foreseeable in order not to place unreasonable burdens on human activity.

We first recognized NIED as an independent cause of action in *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976). There, the plaintiff was shocked when her neighbor drove a car through the plaintiff's wall and into her utility room. *Id.* at 425. She suffered physical heart damage as a result of the stress, in part caused by her concern "for her long-time neighbor, the defendant driver." *Id.* While we held recovery was possible, we emphasized that the case did not involve emotional distress alone; the plaintiff's mental suffering resulted in physical abnormalities. *Id.* at 436. We wanted to make sure that NIED claims were limited. To do so, we held that "the plaintiff's mental distress must be a reaction of a normally constituted person . . . ." *Id.* We charged future courts with administering "adequate limitations" upon NIED claims. *Id.* at 435.

Subsequent to *Hunsley*, we expressed uneasiness with its holding because we felt it did not sufficiently limit the scope of NIED claims. *See Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 787 P.2d 553 (1990). In *Gain*, we narrowed *Hunsely* by holding that family members could recover for NIED only if they were present at the scene of the accident or shortly thereafter. *Id.* at 260. We recognized that "unless a reasonable limit on the scope of

defendants' liability is imposed, defendants would be subject to potentially unlimited liability . . . ." *Id.* Then, in *Hegel v. McMahon*, we narrowed NIED claims even further by holding that the family members must arrive at the scene before a substantial change in the relative's conditions or location. 136 Wn.2d 122, 132, 960 P.2d 424 (1998).

We continued to carefully delineate the circumstances under which an NIED action can be sustained in *Colbert*, 163 Wn.2d 43. In *Colbert*, the plaintiff's daughter drowned after inhaling carbon monoxide fumes emitted from the back of a motorboat. *Id.* at 46. The plaintiff was not present at the scene of the accident and only observed rescue workers pull his daughter's body from the water hours later. *Id.* at 47. We held that the father could not recover for NIED, noting that "[t]here must be actual sensory experience of the pain and suffering of the victim—personal experience of the horror." *Id.* at 56. In other words, the plaintiff must be subject to "conditions analogous to seeing a 'crushed body' . . . or hearing 'cries of pain [or] dying words.'" *Id.* at 57 (emphasis omitted) (alteration in original) (internal quotation marks omitted) (quoting *Gates v. Richardson*, 719 P.2d 193, 199 (Wyo. 1986)). The plaintiff's arrival at the scene hours past his daughter's death after he had

been notified of the accident did not cross this threshold.

Clearly, we have attempted to limit NIED recovery to those individuals who are most likely to be severely impacted by "'the shock caused by the perception of an especially horrendous event.'" *Id.* at 54 (emphasis omitted) (quoting *Gates*, 719 P.2d at 199). In a "bystander" case, the plaintiff witnesses the injury or death of a close family member. The majority attempts to make much of the fact that Deputy Bylsma suffered his supposed injuries directly at the hands of the product (a hamburger). It is more accurate to say that Deputy Bylsma's alleged injury stemmed from the sight of something upsetting, like every other "bystander" claim. If we are going to analogize to negligence cases, we must take these "bystander" cases and their limitations into account.

The majority says the foreseeability line it draws is based on "'mixed considerations of logic, common sense, justice, policy, and precedent.'" Majority at 6 (internal quotation marks omitted) (quoting *King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974)). There is simply no logical reason, however, to limit recovery for emotional distress in NIED cases where a family member is traumatized by seeing or learning of the

death of a loved one, but not in Deputy Bylsma's case, where he claims trauma from the sight of a contaminated burger he did not even eat.

Like in the NIED cases where we imposed limitations on recovery, Deputy Bylsma's claim raises significant concerns about "potentially unlimited liability to virtually anyone who suffers mental distress" caused by receiving a food product that does not meet specifications. *See Gain*, 114 Wn.2d at 260. Should a restaurant be held liable for the emotional distress suffered by a strict vegetarian who is served a dish containing meat? *See Gupta v. Asha Enters, LLC*, 422 N.J. Super. 136, 27 A.3d 953 (2011) (answering no). Is a person who maintains a kosher diet emotionally distressed after possibly being served nonkosher food? *See Siegel v. Ridgewells, Inc.*, 511 F. Supp. 2d 188 (D.D.C. 2007) (answering no). What if a customer finds a strand of hair in his or her food? While certainly off-putting, these scenarios involve the type of mental distress that is simply a "fact of life." *See Hunsley*, 87 Wn.2d at 435. Each falls short of "'an especially horrendous event' involving conditions analogous to seeing a 'crushed body . . . or hearing 'cries of pain[or] dying words.'" *Colbert*, 163 Wn.2d at 57 (emphasis omitted) (alteration in original) (internal quotation

marks omitted) (quoting *Gates*, 719 P.2d at 199)). Similarly, Deputy Bylsma "simply did not experience conditions that are comparable to actually witnessing a loved one's accidental death or serious injuries." *Id.*

Given our most recent NIED case law and its accompanying limitations, the majority's reliance on *Corrigal v. Ball & Dodd Funeral Home, Inc.* is misplaced. 89 Wn.2d 959, 962, 577 P.2d 580 (1978). *Corrigal* was decided soon after *Hunsley*, before we restricted the scope of NIED claims. In *Corrigal*, we specifically held that the plaintiff "stated a cause of action for negligent infliction of mental distress under *Hunsley*." *Id.* Moreover, like *Hunsley*, the result in *Corrigal* was dictated by ordinary negligence principles, which we explicitly held do not apply to NIED claims in *Colbert*:

> *Corrigal* was decided shortly after *Hunsley* and before *Gain* and *Hegel* [*v. McMahon*, 136 Wn.2d 122, 960 P.2d 424 (1998)], at a time when this court tested a claim of [NIED] only against the general elements of a tort claim and no more. As explained, *Gain* and *Hegel* placed limits on liability for [NIED] that were not imposed in *Hunsley*, and these limits were not considered in *Corrigal*. *Hunsley* no longer controls with regards to requirements for a claim of [NIED].

Colbert, 163 Wn.2d at 59 n.3. The remaining cases the majority relies upon to show that we allow recovery in the absence of physical injury are also

readily distinguishable.

We decided *Wright v. Beardsley* in 1907, long before we recognized the tort of NIED or its limitations. 46 Wash. 16, 19, 89 P. 172 (1907) (finding parents could recover for mental anguish resulting from the improper burial of their child). Moreover, that case involved a wrong more akin to the injury of a loved one than the contamination of a food product that the plaintiff did not consume. We discussed *Wright* in *Kneass v. Cremation Society of Washington*, stating that "'[t]he [defendants'] acts [in *Wright*] were regarded by the court as wilful . . . .'" 103 Wash. 521, 524, 175 P. 172 (1918) (finding parents of an infant child who had been cremated and whose ashes had been lost could not recover for mental suffering and anguish because there was no physical injury or pecuniary loss) (quoting *Corcoran v. Postal Tele.-Cable Co.*, 80 Wash. 570, 584, 142 P. 29 (1914)). "[T]he rule in the *Wright* case was based on a wilful wrong[, not negligence,] and the physical invasion of the plaintiff's rights," not just emotional distress. *Kneass*, 103 Wash. at 524. Consequently, *Wright* fails to offer any support to the majority's holding.

Brillhardt v. Ben Tipp, Inc. is similarly distinguishable because it was

decided in 1956, before we recognized the tort of NIED or its limitations. 48 Wn.2d 722, 297 P.2d 232 (1956) (allowing a plaintiff to recover for annoyance and inconvenience when the defendant inadvertently printed plaintiff's telephone number on its sale slips causing plaintiff to be harassed by telephone calls). Furthermore, the *Brillhardt* court said that recovery was possible only because there was "an actual invasion of the respondent's right to enjoy her property without unreasonable interference." *Id.* at 727. *Brillhardt* did not allow recovery based solely on emotional distress.

Conclusion

The answer to the Ninth Circuit Court of Appeals' certified question should be "no"; the WPLA does not permit relief for emotional distress damages, in the absence of physical injury, caused to a purchaser who is served but does not consume a contaminated food product. Under *Hiltbruner*, emotional distress damages are available for a statutory cause of action only if the statute so provides or if the statute requires intentional conduct to impose liability. The WPLA's definition of "harm" references case law. The only case on point, *Fisons*, instructs emotional distress damages are not recoverable under the WPLA. But, even if the WPLA were

silent, emotional distress damages are not available under *Hiltbruner* because the WPLA imposes liability without fault.

Furthermore, looking to NIED cases is inappropriate because a WPLA claim does not require proof of negligence. Yet, even if we were to do so, the analysis would not instruct that emotional damages are available here. NIED is a judicially created and carefully limited cause of action that allows recovery for a plaintiff who experiences conditions that are comparable to witnessing a love one's accidental death or serious injury. The sight of a contaminated burger comes nowhere near this threshold. Emotional distress damages are not recognized by Washington law under these circumstances. I respectfully dissent.

AUTHOR:
Justice James M. Johnson

WE CONCUR:
Chief Justice Barbara Madsen

Justice Susan Owens